UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WAYNE HOLLOWAY, Petitioner, vs. JOHN MARSHALL, Warden, Respondent.	Civil No. 08cv0861-JM (AJB) **SUMMARY DISMISSAL OF SUCCESSIVE PETITION PURSUANT TO 28 U.S.C. § 2244(b)(3)(A) GATEKEEPER PROVISION**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to the All Writs Act, 28 U.S.C. § 1651. Petitioner challenges his 1993 state court conviction for residential burglary, which was used to enhance his sentence following his 2003 conviction for selling and furnishing cocaine base, contending that he was denied his right to be present at a readback of testimony. (Pet. at 2-6.) Although Petitioner acknowledges that he presented the same claim in a prior federal habeas petition brought in this Court pursuant to 28 U.S.C. § 2254, and that this Court held that he was precluded from collaterally attacking the prior conviction pursuant to Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001), he contends a habeas petition pursuant to the All Writs Act is an appropriate vehicle to challenge his prior conviction because he would otherwise have no avenue to challenge the constitutionality of the prior conviction. (Pet. at 2.) For the following reasons, this case is summarily dismissed pursuant to 28 U.S.C. § 2244(b)(3)(A).

PRIOR FEDERAL HABEAS PETITION DENIED ON THE MERITS

On January 20, 2006, Petitioner filed a Petition for a Writ of Habeas Corpus in the District Court for the Central District of California, which was transferred to this Court because Petitioner was challenging a 2003 conviction and sentence from the San Diego Superior Court. (See Petition [Doc. No. 1] in SO. DIST. CA. CIVIL CASE NO. 06cv0226-LAB (PCL).) Petitioner claimed in that petition that: (1) he was entrapped; (2) he was the subject of selective prosecution; and (3) that his 1993 conviction for residential burglary was invalid because he was denied his right to be present at a readback of testimony during that trial, and it should therefore not have been used to enhance his sentence. (Id. at 20-32.) On May 11, 2007, this Court denied the petition on the merits of the claims presented. (See Order filed 5/11/07 [Doc. No. 29] in SO. DIST. CA. CIVIL CASE NO. 06cv0226-LAB (PCL).) Specifically, with respect to the sentence enhancement claim, the Court held that Lackawanna precluded Petitioner from challenging the prior conviction on the basis that he was denied his right to be present at the readback. (Id. at 7-8.) Petitioner appealed that judgment. On April 1, 2008, the Ninth Circuit Court of Appeals denied Petitioner's request for a Certificate of Appealability and dismissed the appeal. (See Order filed 4/1/08 [Doc. No. 43] in SO. DIST. CA. CIVIL CASE NO. 06cv0226-LAB (PCL).)

INSTANT PETITION BARRED BY GATEKEEPER PROVISION

Petitioner is now seeking to once again challenge the same sentence he challenged in his prior federal habeas petition. Unless a petitioner shows he or she has obtained an order from the appropriate court of appeals authorizing the district court to consider a successive petition, the petition may not be filed in the district court. See 28 U.S.C. § 2244(b); Felker v. Turpin, 518 U.S. 651, 656-57 (1996). This Court lacks jurisdiction over such a petition unless the Ninth Circuit has given Petitioner permission to file the petition in this Court. Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

Petitioner seeks to circumvent this restriction by invoking the All Writs Act, which provides that the federal courts "may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). However, the Ninth Circuit has held "that a state habeas petitioner may not avoid the limitations on successive petitions by styling his petition as one pursuant to 28 U.S.C. § 2241 rather than 28 U.S.C. § 2254." Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999), citing Greenawalt, 105 F.3d at 1287-88. The Ninth Circuit has held that section 2254 "is the exclusive avenue for a state court prisoner to challenge the constitutionality of his detention." White v. Lambert, 370 F.3d 1002, 1007 (9th Cir. 2004). Accordingly, Petitioner cannot circumvent the restriction on successive petitions by styling his challenge to his state court sentence as a petition under the All Writs Act. Rather, Petitioner must proceed with his claim, if at all, under section 2254, and must first receive permission from the Ninth Circuit to file a Petition in this Court presenting a challenge to his conviction and sentence which was the subject of his prior petition.

CONCLUSION

Because Petitioner has not indicated that he has obtained permission from the Ninth Circuit Court of Appeals to file a successive petition, this Court cannot consider his Petition. Accordingly, the Court **DISMISSES** this action without prejudice to Petitioner filing a petition in this court if he obtains the necessary order from the Ninth Circuit Court of Appeals. The Clerk shall include a blank Ninth Circuit Application for Leave to File Second or Successive Petition form along with this Order and shall close the file.

IT IS SO ORDERED.

DATED: May 27, 2008

Hon. Jeffrey T. Miller
United States District Judge

CC: ALL PARTIES